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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 531

S. BUCHSBAUM & CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 3) is reported at 105 F. Supp. 821.

JURISDICTION

The judgment of the Court of Claims was entered July 15, 1952 (R. 6). A timely motion for rehearing was denied October 7, 1952 (R. 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims may enter summary judgment in favor of defendant under Rule 51 of that court when the only question is whether a written document constituted a claim under Section 17(a) of the Contract Settlement Act, although not specifically designated as such.

RULE AND STATUTES INVOLVED

Court of Claims Rule 51. Summary Judgment

* * * * *

(b) For Defending Party: A party against whom a claim or counterclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceeding Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7(b) for filing a response thereto, such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

The Contract Settlement Act of 1944 (Act of July 1, 1944, c. 358, Secs. 13, 17, 58 Stat. 649, 41 U.S.C. Sec. 101-125) provides in pertinent part:

Sec. 13.

* * * * *

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U.S.C. 41 (20) * * *.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

* * * * *

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, * * * or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of

this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

Sec. 17. Defective, informal and quasi contracts.

(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

* * * * *

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act.

STATEMENT

On December 18, 1944, petitioner entered into a contract with the War Department for the manufacture of airplane tailored paulins. This contract was terminated for the convenience of the Government on August 15, 1945. On February 16, 1946, petitioner and respondent entered into Supplemental Agreement No. 5 (R. 4-5), an agreement for the consolidated settlement and termination of petitioner's contracts and change orders. Petitioner

agreed that the payment of the balance therein specified constituted payment "in full and complete settlement of the amount due the Contractor by reason of the complete termination of work under the Contracts, and of all other claims of the Contractor under the Contracts and under the Act, insofar as it pertains to the Contracts, except as hereinafter provided in Article 5 hereof." Article 5 of the contract provided in pertinent part:

> Article 5. Upon the payment of the sums payable under Article 4 hereof, all rights and liabilities of the parties under the Contract(s) and under the Act, insofar as it pertains to the Contract(s), shall cease forthwith and be forever released, except:
>
> * * * * *
>
> (8) The right of the Contractor to receive from the Government any sums of money for reimbursement for additional costs incurred as a result of CCN No. 3 (N-33582) and CCN No. 4 (N-34793) to the Contract No. W 33-038-ac-5950, which CCNs were never formalized, in the event the Government is found liable for said costs under appropriate procedure under Section 17a of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations.

Accordingly, the only rights reserved by the petitioner were those which came under section 17(a) and the implementing paragraph (308-H) of the Procurement Regulations (R. 59-60).

On April 10, 1946, petitioner submitted to the Commanding General at Dayton, Ohio, a written claim denominated "Request for Price Increase", amounting to $65,381.38. To this claim was attached a number of letters and schedules, including petitioner's original bid on the contract in suit (R. 60-63).

On July 25, 1946, the contracting officer issued a written decision that a portion of petitioner's claim qualified for approval under Procurement Regulation 308-H (R. 63-64). The balance of the claim was denied. On October 9, 1946, the contracting officer formally decided the claim of April 10, 1946, approving a part thereof in the amount of $8,053.53 and denying the balance. Petitioner did not appeal from this decision.

On January 30, 1948, petitioner filed with the contracting officer a written request dated January 19, 1948, conforming closely to the disallowed portion of the claim of April 10, 1946, and specifically stating that it was made under Section 17(a) of the Contract Settlement Act. On May 22, 1950, the contracting officer denied this claim. On June 21, 1950, petitioner appealed from the adverse decision to the Appeal Board of the Office of Contract Settlement. On motion of respondent the Appeal Board dismissed the appeal as untimely. Thereafter, on March 20, 1951, suit was brought in the Court of Claims under Section 17(a) of the Contract Settlement Act (41 U.S.C. 117(a), 58 Stat. 665).

Respondent's motion for summary judgment[1] was granted by the Court of Claims on the ground that the claim of April 10, 1946, was a claim under Section 17(a) of the Contract Settlement Act and that petitioner "did not appeal from the decision of the contracting officer, or bring suit within the time required by Section 13 of the Contract Settlement Act" (R. 6)

ARGUMENT

The determination by the Court of Claims, for the purpose of its summary judgment procedure, that there was no genuine issue as to whether a particular letter, *i.e.*, the letter of April 10, 1946, sought relief under Section 17(a) of the Contract Settlement Act does not present a matter of general importance.

Under Section 13(b) of the Contract Settlement Act of 1944 (41 U. S. C. 113(b), 58 Stat. 649, 661) a contractor has the options of appealing from the findings of the contracting agency to the Appeal Board, of bringing suit in the Court of Claims, or of bringing suit in the Court of Claims in the event he is aggrieved by the findings of the Appeal Board. See also Section 13(d)(2) of the Contract Settlement Act, 41 U. S. C. 113(d)(2). Petitioner, therefore, had to appeal either to the Appeal Board or the Court of Claims within ninety days of the delivery of the findings of the contracting agency, failing which such findings became conclusive

[1] The motion was made on the petition, the memorandum of pre-trial conference, and the exhibits filed at the pre-trial conference (R. 3).

(Section 13(c)(2) of the Contract Settlement Act). Petitioner does not dispute the holding that if the claim filed on April 10, 1946 (R. 60-63) was under Section 17(a) of the Contract Settlement Act and Paragraph 308-H of the Procurement Regulations, the Appeal Board properly dismissed the appeal filed with it on June 21, 1950, as untimely and the suit in the Court of Claim was barred.

Petitioner, which took advantage of the partial allowance of the claim it presented on April 10, 1946, fails to specify wherein any error was committed, or to tender any hypothesis as to what the claim might conceivably have been if it was not a Section 17(a) claim based on an informal contract. The letter of April 10, 1946, spoke for itself and clearly indicated that statutory relief under that section was sought. Extrinsic evidence could not contradict what the letter established beyond doubt. The letter could only have been intended to come within the exception to the release contained in the termination supplemental agreement of February 16, 1946;[2] its statement that "The actual CCN-3 was *never formalized*" (R. 60) is explicable only as a request for a price increase under Section 17[3] which fell within the exception to the release; the letter was so understood and acted on by the War

[2] The exception covered reimbursement for additional costs in the event the Government might be liable therefor under Section 17(a) of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations.

[3] Petitioner lamely argues that the letter in the light of the release need not have been a claim under Section 17 because "there have been litigants who blindly pursued remedies denied them by prior releases" (Pet. 13).

Department, which said that a portion qualified for approval under Procurement Regulation 308-H; and petitioner accepted payment of the partial allowance on that understanding.[4] Moreover, the claim made almost two years later which was designated as a Section 17(a) claim, was almost identical to the claim of April 10, 1946.

As the case involves nothing more than the application of generally accepted principles to a particular set of facts, so there is no occasion to review the use of the summary judgment procedure by the Court of Claims.

The principles governing the allowance of motions for summary judgment have been fully developed and are no longer in doubt.[5] Rule 51 of the Court of Claims is modeled on Rule 56 of the Federal Rules of Civil Procedure. Rules of the Court of Claims, 118 C. Cls. xi, xii. The decisions of the Court of Claims disclose that it awards summary judgment sparingly, in accord with the limitations generally accepted in the federal courts. *Florida Dehydration Co.* v. *United States,* 101 F. Supp. 361 (C. Cls.); *Love* v. *United States,* 122 C. Cls. 144, 151; *Hadden* v. *United States,* 105 F. Supp. 1010,

[4] If petitioner had not understood that its claim was properly disallowed, it would not have then split its claim, but would have filed in proper form both the allowed and disallowed portion.

[5] The recent literature is copious. See, *e.g.*, 3 Moore, *Federal Practice*, pp. 3171, *et seq.*; Yankwich, *Summary Judgment under Federal Practice*, 40 Calif. Law Rev. 204 (June 1952); Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567 (May 1952); McDonald, *Summary Judgments*, 30 Texas L. Rev. 285 (January 1952); 48 Columbia L. Rev. 780 (July 1948); 99 Univ. Pa. L. Rev. 212 (November 1950); 55 Yale L.J. 810 (June 1946).

1017 (C. Cls.); *Garcia* v. *United States*, 108 F. Supp. 608, 613 (C. Cls.); *Palace Corporation* v. *United States*, C. Cls. No. 49471, decided March 3, 1953. This is an ordinary case without unusual features, which involves no question of the credibility of witnesses or of "trial by affidavit." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620; *Colby* v. *Klune*, 178 F. 2d 872 (C.A. 2); *Arnstein* v. *Porter*, 154 F. 2d 464 (C.A. 2); *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1022 (C.A. 3); *Whitaker* v. *Coleman*, 115 F. 2d 305, 306 (C.A. 5). Since on the facts of this case evidence would not affect the outcome of the proceedings (*United States* v. *Gypsum Co.*, 340 U. S. 76, 85; *Broderick Wood Products Co.* v. *United States*, 195 F. 2d 433, 438-9 (C.A. 10)), and the courts of appeals would sustain judgments for defendants entered on the supporting documents pursuant to Rule 56, F. R. C. P., it does not avail petitioner to assert conflict with general cautionary expressions in the opinions. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 6.

In sum, this case presents merely a routine application of the summary judgment procedure. As a documentary case, it is not on the borderline. Cf. *Fogarty* v. *United States*, 340 U. S. 8. By the strictest standards the motion would have been granted on the strength of what petitioner's letter of April 10, 1946, examined in context, admitted.*

* "• • • where the movant's case is established by official records and documents, a failure to impeach such evidence indicates the absence of any issue warranting a full trial." Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 Columbia L. Rev. 780, 782 (July 1948).

The Court of Claims, after the pretrial conference and at the time it passed on the motion for summary judgment, was in possession of all the pertinent data it could have after a trial. See *Fee* v. *Johnson & Wimsatt*, 127 F. 2d 729, 737 (C. A. (D. C.); *Tripp* v. *May*, 189 F. 2d 198 (C.A. 7). And petitioner cannot demonstrate any oral testimony it could adduce which would in any way alter or affect the conclusion reached by the Court of Claims. Cf. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (C.A. 2); *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C.A. 2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

PAUL A. SWEENEY,
HERBERT H. MARKLEY,
Attorneys.

APRIL 1953.